

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NAVIGATOR CAPITAL PARTNERS, L.P.,
on behalf of itself and all others similarly situated,

Plaintiff,

- against -

BEAR STEARNS ASSET MANAGEMENT
INC., *et al.*,

Defendants.

FIC, L.P., individually, and on behalf of all others
similarly situated,

Plaintiff,

- against -

BEAR STEARNS ASSET MANAGEMENT
INC., *et al.*,

Defendants.

GEOFFREY VARGA and WILLIAM
CLEGHORN, *et al.*,

Plaintiffs,

- against -

THE BEAR STEARNS COMPANIES, INC.,
et al.,

Defendants.

**DEFENDANT RAYMOND MCGARRIGAL'S CONSOLIDATED
MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS
THE AMENDED COMPLAINTS IN VARGA, FIC AND NAVIGATOR**

Defendant Raymond McGarrigal respectfully submits this Consolidated
Memorandum of Law in Support of his Motion to Dismiss the Amended Complaints

(“AC”) filed in *FIC, L.P. v. Bear Stearns Asset Management, et al.* (No. 07 Civ. 11633), *Navigator Capital Partners, L.P. v. Bear Stearns Asset Management, et al.* (No. 07 Civ. 07783), and *Varga, et al. v. The Bear Stearns Companies, et al.* (No. 08 Civ. 03397).

Mr. McGarrigal adopts and incorporates herein arguments made by defendants The Bear Stearns Companies LLC (f/k/a The Bear Stearns Companies Inc.) (“BSC”), Bear Stearns Asset Management Inc. (“BSAM”), JPMorgan Securities Inc. (f/k/a Bear Stearns & Co. Inc.) (“BS&Co.”), JPMorgan Clearing Corp. (f/k/a Bear Stearns Securities Corp.) (“BSSC”), George Buxton, Barry Cohen, Gerald Cummins, Michael Guarasci, Greg Quental and David Sandelovsky (together, the “Bear Stearns Defendants”), in their Consolidated Memorandum of Law in Support of Their Motion to Dismiss the Complaints in *Navigator*, *FIC*, and *Varga*, filed on October 30, 2008. Mr. McGarrigal also makes separate arguments, which are set forth below.

ARGUMENT

I. THE VARGA COMPLAINT

A. Mr. McGarrigal Adopts and Incorporates Herein Certain of the Bear Stearns Defendants’ Arguments in Support of Their Motion to Dismiss the Varga Complaint.

Plaintiffs Geoffrey Varga, William Cleghorn, Stillwater Capital Partners L.P. (“Stillwater”) and Essex Fund Limited Claimant International Capital & Management Company LLC (“Essex”) name Mr. McGarrigal as a defendant in eight of the 17 claims asserted in their amended complaint. Mr. McGarrigal respectfully moves to dismiss each of these claims, and adopts and incorporates herein the following Bear Stearns Defendants’ arguments in support of his motion:

Claim No.	Claim Asserted	Bear Stearns Defendants' Argument
1	Section 10(b) Securities Fraud	Section IX.A – Lack of Standing
2	Section 20(a) Securities Fraud	Section IX.B – Fails Necessarily on Dismissal of the Underlying Fraud Claim (count 1)
3	Common Law Fraud	Section I.B – No Pre-Suit Demand Section II.A – Lack of Standing and Also Necessarily Falls with Securities Fraud Claim (incorporating Section IX)
4	Breach of Fiduciary Duty	Section I.B – No Pre-Suit Demand Section IV.D – Martin Act Preemption
6	Aiding and Abetting Walker Defendants' Breach of Fiduciary Duty	Section I.B – No Pre-Suit Demand Section V.A – Necessarily Fails with Underlying Breach of Fiduciary Duty Claim (incorporating Walker Defendants' Motion to Dismiss) Section V.B.3 – Insufficiently Conclusory Allegations under Rule 9(b)
7	Aiding and Abetting Deloitte Fraud	Section I.B – No Pre-Suit Demand Section III.A – Necessarily Fails with Underlying Fraud Claim (incorporating Deloitte Motion to Dismiss) Section III.B.1 – Insufficiently Conclusory Allegations under Rule 9(b)
8	Negligence and Gross Negligence	Section I.B – No Pre-Suit Demand

Claim No.	Claim Asserted	Bear Stearns Defendants' Argument
		Section VI – Martin Act Preemption
17	Derivative Claim for Unjust Enrichment	Section I.B – No Pre-Suit Demand Section VIII – No Allegation of Actual Enrichment

II. THE FIC COMPLAINT

- A. Mr. McGarrigal Adopts and Incorporates Herein Certain of the Bear Stearns Defendants' Arguments in Support of Their Motion to Dismiss the FIC Complaint.

Plaintiff FIC, L.P. names Mr. McGarrigal as a defendant in three of the five claims asserted in its amended complaint. Mr. McGarrigal respectfully moves to dismiss each of these claims, and adopts and incorporates the following Bear Stearns Defendants' arguments herein in support of his motion:

Claim No.	Claim Asserted	Bear Stearns Defendants' Argument
1	Breach of Contract	Section VII – Failure to Plead Necessary Specifics of Breach
2	Breach of Fiduciary Duty	Section IV.A – Lack of Standing
4	Derivative Claim for Breach of Fiduciary Duty	Section I.A – No Pre-Suit Demand

- B. Mr. McGarrigal Separately Moves to Dismiss the Breach of Contract Claim in the FIC Complaint.

Count One, which alleges breach of contract, should be dismissed for the separate reason that Mr. McGarrigal was not a party to the contract in question. FIC was a limited

partner of Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage, L.P. pursuant to a limited partnership agreement (the “Enhanced Fund LPA”) executed between the investors on the one hand, and BSAM, the general partner of the Domestic Funds, on the other (see Exhibit J to the Declaration of Marjorie E. Sheldon)¹. This LPA forms the basis of FIC’s breach of contract claim. (*FIC AC ¶¶* 123-28.)

Under Delaware law,² unless an officer or director binds himself individually, he cannot be held personally liable on the contracts of his corporation. See *International Ass’n of Heat and Frost Insulators Asbestos Workers Local Union 42 v. Absolute Envtl., Servs., Inc.*, 814 F. Supp. 392, 405 n.12 (D. Del. 1993); *Transportes Aereos de Angola v. Ronair, Inc.*, 693 F. Supp. 102, 111 (D. Del. 1988); *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994); *Grand Ventures, Inc. v. Paoli’s Restaurant, Inc., No.* 95 Civ. 03-013, 1996 WL 30022, at *3 (Del. Super. Jan. 4, 1996). The same is true under New York law. See *Key Bank of New York v. Grossi*, 227 A.D.2d 841, 642 N.Y.S.2d 403, 404 (3d Dep’t 1996); *Lerman v. Ne. Permanente Med. Group, P.C.*, 212 A.D.2d 672, 622 N.Y.S.2d 764, 764 (2d Dep’t 1995).

Mr. McGarrigal is not a party to the Enhanced Fund LPA, and FIC has not alleged that he bound himself individually to BSAM’s obligations. He therefore cannot be held liable for any breach of the terms of the Enhanced Fund LPA. For this reason, as well as

¹ For purposes of these motions, the Court may take judicial notice of and rely upon the LPAs. See, e.g., *Brass v. American Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (on motion to dismiss, court may consider “documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs’ possession or of which plaintiffs had knowledge and relied on in bringing suit”).

² The Enhanced Fund LPA is governed by Delaware law. (see Exhibit J to the Declaration of Marjorie E. Sheldon at 47.)

those raised by the Bear Stearns Defendants, FIC's breach of contract claim against Mr. McGarrigal should be dismissed.

III. THE NAVIGATOR COMPLAINT

A. Mr. McGarrigal Adopts and Incorporates Herein
Certain of the Bear Stearns Defendants' Arguments in
Support of Their Motion to Dismiss the Navigator Complaint.

Plaintiff Navigator Capital Partners, L.P. names Mr. McGarrigal as a defendant in five of the nine claims asserted in its amended complaint. We respectfully submit that four of these claims should be dismissed for reasons cited in the dismissal motion filed by the Bear Stearns Defendants, dated October 30, 2008, and the other should be dismissed for the separate reason described below. Specifically, Mr. McGarrigal incorporates the following Bear Stearns Defendants' arguments in support of his motion to dismiss:

Claim No.	Claim Asserted	Bear Stearns Defendants' Argument
1	Class Claim for Breach of Fiduciary Duty	Section IV.A – Lack of Standing
3	Class Claim for Common law fraud	Section II.B.1 – Failure to Plead Class-Wide Reliance Section II.B.2 – Non-cognizable Holder Claim.
6	Derivative Claim for Breach of Fiduciary Duty	Section I.C – No Pre-Suit Demand
8	Derivative Claim for Gross Negligence	Section I.C – No Pre-Suit Demand

B. Mr. McGarrigal Separately Moves to Dismiss the
Breach of Contract Claim in the Navigator Complaint.

For reasons identical to those applicable to FIC's breach of contract claim, Navigator's breach of contract claim against Mr. McGarrigal must fail. Navigator was a limited partner of Bear Stearns High-Grade Structured Credit Strategies, L.P. pursuant to a limited partnership agreement (the "High Grade Fund LPA") executed between the investors on the one hand, and BSAM, the general partner of the Domestic Funds, on the other (see Exhibit I to the Declaration of Marjorie E. Sheldon). This LPA forms the basis of Navigator's breach of contract claim. (*Navigator AC ¶¶ 376-83*).

Because Mr. McGarrigal is not a party to the High Grade Fund LPA, and Navigator has not alleged that he separately bound himself to BSAM's obligations, he cannot be held liable for any breach of the terms of the High Grade Fund LPA.³ See *International Ass'n of Heat and Frost Insulators Asbestos Workers Local Union 42 v. Absolute Envtl., Servs., Inc.*, 814 F. Supp. 392, 405 n.12 (D. Del. 1993); See *Key Bank of New York v. Grossi*, 227 A.D.2d 841, 642 N.Y.S.2d 403, 404 (3d Dep't 1996). For this reason, Navigator's breach of contract claim should be dismissed.

³ The High Grade Fund LPA is governed by Delaware law. (*see* Exhibit I to the Declaration of Marjorie E. Sheldon, at 39)

CONCLUSION

For the foregoing reasons, Mr. McGarrigal respectfully requests that the Court dismiss the claims asserted against him in the *FIC*, *Varga* and *Navigator* actions.

Dated: October 30, 2008
New York, New York

Respectfully submitted,

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